

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 187 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
Nos. 1 to 5 No

PRAJAPATI DHAREMESHIBHAI TAPUBHAI

Versus

PRAJAPATI MAGANBHAI MOTIBHAI

Appearance:

MR MH RATHOD for Petitioners

MR SURESH M SHAH for Respondent No. 1

UNSERVED-REFUSED (N) for Respondent No. 2

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 14/09/98

ORAL JUDGEMENT

This revision under section 115 of the Code of Civil Procedure has been filed against an order of the lower Appellate Court rejecting an application of the revisionists under section 5 of the Limitation Act for condonation of delay in filing the appeal against an exparte decree.

Brief facts are that in Civil Suit No. 22 of 1992 the exparte decree was passed on 19.7.1993. The application for setting aside the exparte decree was not moved. The revisionists preferred an appeal after lapse of statutory period of limitation. In the said application, their case was that they came to know of the decree on or about 13.1.1994, when notice of execution proceeding was received. Thereafter, they preferred the appeal on 21.6.1994. It was mentioned that the application for certified copy was moved on 17.5.1994 which was received on 21.5.1994. According to the revisionists the appeal could be filed on 18.2.1994. After excluding the time taken for preparation of copies, the appeal was rightly filed on 21.6.1994. The grounds for condonation of delay which were taken in the application are that the appeal was filed after a month of knowledge of the decree by the revisionists. The second ground was that the applicants are entitled to exclude the period of summer vacation in computing the limitation and the third ground was that the applicants were not served with the summons of the suit and therefore, they had no knowledge of the suit before receiving the notice of execution proceedings.

These grounds were not accepted by the lower appellate Court which ultimately rejected the application for condonation of delay in filing the appeal. It is therefore this revision.

The lower appellate Court has proceeded on the assumption that the applicants were not served with the summons. Mr. Shah contends that the service of summons was personally made on the applicants but for this there is no material before this Court. Hence, it has to accept the observation of the lower Appellate Court that summonses were not served on the revisionists.

It is however, to be seen whether the other two grounds were sufficient for condonation of delay. Normally liberal view is taken in the matter of condonation of delay in filing the appeal, revision etc. But liberal view is to be taken when there is some cogent explanation for delay in filing the appeal. In the facts and circumstances of the case, there is no cogent explanation for delay. Even if it is accepted that the revisionists had knowledge of the decree only on 13.1.1994 they should have filed application for certified copies immediately thereafter but they could not do so, rather they waited for more than four months and moved the application for copy on 17.5.1994. Thus,

the period between 13.1.1994 to 17.5.1994 cannot be excluded. The time for preparation of copy for about four days can be excluded but evenafter excluding this period of four days this appeal was not preferred in time, it was filed on 21.6.1994.

However, in order to explain this delay further stand of the revisionists is that they are entitled to exclude the period of summer vacation while computing the period of limitation. According to the lower Appellate Court, it was in vacation from 2.5.1994 to 12.6.1994 which is wrongly mentioned by the lower Appellate Court as 12.6.1993. The lower Appellate Court reopened on 13.6.1994. It was not a case where the period of limitation expired during vacation nor the appeal was filed on the opening day of the Court after vacation. On the other hand the appeal was filed on 21.6.1994 i.e. after seven days of opening of the Appellate Court after vacation. As such this period has also not to be excluded. Thus, from what has been stated above it is apparent that no sufficient cause for condonation of delay in filing the appeal could be made out by the revisionists. The application was therefore rightly rejected by the trial Court.

Learned Counsel for the revisionists has contended that the service of summons was obtained fraudulently by obtaining thumb impression of some imposter. However, this matter was not to be decided by the lower Appellate Court. The proper course was to agitate the mode of service by filing an application under Order 9 Rule 13 CPC for setting aside exparte decree.

Learned Counsel for the revisionists requests that he may be permitted to move an application under Order 9 Rule 13 CPC. However, such permission is not required to be given while disposing of this revision. If the law permits he can move such application. At this stage, learned Counsel for the respondents points out that in view of explanation added to Order 9 Rule 13 CPC once the remedy to file an appeal was availed of by the revisionists and the appeal was disposed of in any manner no application shall lie under order 9 Rule 13 CPC for setting aside the exparte decree. In reply to this contention, learned Counsel for the revisionists contended that his appeal was not disposed of by the lower Appellate Court and that only application for condonation of delay in filing the appeal was disposed of. The order under revision also shows that only application for condonation of delay was dismissed and

there was no consequential order that the appeal was dismissed being time barred. Consequently, if the law permits and the revisionists moves an application under Order 9 Rule 13 CPC it would be open to the respondents to raise objection before the concerned Court whether such application could be maintained in view of explanation under Order 9 Rule 13 CPC and also on the point of limitation. With the above observations the revision is dismissed. No order as to costs.

In view of the statement of the respondent's Counsel that till 28.9.1998 the decree shall not be executed by the respondents, no further orders for staying the execution is required to be passed in this revision.

Sd/-

(D.C.Srivastava, J)
